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No. 89-746

In The

Supreme Court of the United States

October Term, 1989

GENE R. SMITH CORPORATION,

Petitioner,

v.

TERRY'S TRACTOR, INC., a California corporation; GEORGE LARABEE, individually and doing business as L & L CONSTRUCTION AND L & L ELECTRIC; WALTER L. SCHWAAR, individually and doing business as THE LIGHT GALLERY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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INTRODUCTION

Petitioner, Gene R. Smith Corporation has prayed for a writ of certiorari to

review the judgment and opinion of the Court of Appeals of the State of California, following its denial of Petition for Review by the Supreme Court of the State of California on July 13, 1989.

The present writ is sought based upon an alleged conflict between the Ninth and Third Circuits denying petitioner a state court cause of action for malicious prosecution and abuse of process resulting from an involuntary bankruptcy. Respondent Terry's Tractor, Inc. contends no conflict exists as the case used from the Third Circuit has limited application.

STATEMENT OF CASE

Petitioner, Gene R. Smith Corporation ("Smith") was a developer of apartments in the Cities of Oceanside, Vista and Escondido in San Diego County. Respondent, Terry's

Tractor, Inc. ("Terry") had commercial dealings (Terry rented, manned and maintained equipment at an hourly rate at Smiths request.)[1] An alleged dispute was raised with respondent over contractors licensing requirements to raise a bonafide dispute issue after the involuntary filing, this has since been resolved favorable to respondent. See Footnote 1.

Thereafter, Smith created the same alleged disputes with other respondents who joined in the petition. On November 28, 1984, the bankruptcy court found the filing premature and dismissed the petition without prejudice. No impropriety was found or

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[1] Since the dismissal without prejudice of the involuntary bankruptcy and prior to the filing of this writ, Terry obtained judgment against Smith for breach of rental agreement on August 15, 1989, San Diego Superior Court, North County Judicial District Case No. N27443, in the principal amount claimed of $80,915.00

prejudice. No impropriety was found or adjudicated and the bankruptcy court dismissed without prejudice indicating that it may well see the case again.

The bankruptcy court judge addressed the hearing of damages and counsel for Smith waived said proceedings under 11 U.S.C. § 303(i) to pursue its remedy, albeit erroneously, in state court.

Smith then proceeded to file a state court Declaratory Relief action to ensure itself of no refiling of the involuntary bankruptcy and to create a bona fide dispute in November 1984. In December 1984, Smith filed the state court malicious prosecution action and abuse of process which is the subject of this present petition.

Respondent contends that the Fourth District Court of Appeals for the State of California was correct in its ruling; and

that no conflict exists as Smith contends between the Ninth and Third United States Circuit Courts of Appeal.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. THE BANKRUPTCY COURT DID NOT HEAR OR CONSIDER ANY DAMAGES UNDER 11 U.S.C. 303(i) BECAUSE PETITIONER WAIVED THEIR RIGHT TO HAVE THE COURT HEAR ITS DAMAGE CLAIM.

The appellant has not clearly or concisely informed the Court that it had an opportunity to have the issue of damages adjudicated by the Bankruptcy Judge prior to the dismissal of the involuntary proceeding or at a subsequent hearing after dismissal by reserving its right with the bankruptcy court. Petitioner expressly waived its rights to the hearing of damages under the mistaken belief it could have the state court interpret the bankruptcy code in a

malicious prosecution and abuse of process action in state court.

If dismissal is for any cause other than consent of all petitioners and the debtor, and <u>if the debtor does not waive</u> the right to judgment, the court may grant judgment against the petitioners and in favor of the debtor for costs, a reasonable attorney's fee, or any damages proximately caused . . . Additionally, if any petitioner filed the petition in bad faith, the court may grant judgment against such petitioner for any damages proximately caused by such filing, or for punitive damages. (Emphasis added.)

5 Fed Proc., L.Ed § 9:268

B. PETITIONERS THRUST OF THE PETITION FOR WRIT OF CERTIORARI IS ITS DENIAL TO RIGHT OF JURY TRIAL UNDER THE SEVENTH AMENDMENT AS PETITIONER THOUGHT NO RIGHT TO A JURY TRIAL EXISTED IN THE BANKRUPTCY COURT.

Petitioner by its waiver of any hearing of damages by the bankruptcy court also was erroneous in its assumption as it waived its right to a jury trial in bankruptcy court.

Prior to the amendments dated July 10, 1984 and to alleviate the turmoil over **NORTHERN PIPELINE CONSTRUCTION CO. v. MARATHON PIPE LINE CO., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982)**, Congress, consistent with the Constitution could confer the power to conduct jury trials in the bankruptcy courts.

28 U.S.C. § 1411 (1986) provides:

> (a) Except as provided in subsection (6) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non bankruptcy law with regard to a personal injury or wrongful death tort claim.
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury. (Emphasis added.)

The claims of malicious prosecution and abuse of process are akin to personal injury actions and triable by a jury in either bankruptcy court or district court. Further, subsection(b) expressly states the district court may waive jury trial. Upon proper application to the district court a jury trial could have been held in the bankruptcy court absent petitioners waiver. The right to trial by jury in the bankruptcy courts since July 10, 1984 is supported by the findings in **In RE M^{c}CORMICK, 67 B.R. 838 (D. NEV. 1986); In RE ADAMS, BROWNING & BATES, LTD., 70 B.R. 490 (Bkrtcy. E.D.N.Y. 1987).**

C. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT AND THIRD CIRCUIT ON A STATES' JURISDICTION OVER MALICIOUS PROSECUTION AND ABUSE OF PROCESS AS A RESULT OF AN INVOLUNTARY BANKRUPTCY.

The Ninth Circuit Court of Appeals in **GONZALES v. PARKS 830 F.2d 1033 (9th Cir. 1987)** states what respondent perceives as the correct intent of Congress by its interpretation of the exclusivity of the federal courts over 11 U.S.C. § 303 issues including that of Malicious Prosecution and Abuse of Process.

Petitioner relies upon **PARADISE HOTEL CORP. v. BANK OF NOVA SCOTIA 842 F.2d 47 (3d Cir. 1988)** to defeat and/or create a conflict between the appellate courts to maintain its contention that this Court needs to review and resolve a conflict. There is no conflict because a careful reading of **PARADISE** shows the Third Circuit is discussing non exclusivity between bankruptcy courts and district courts. Both courts quite clearly are federal and capable of interpreting Title 11 of the United

States Code. **PARADISE** does not address directly or by inference or innuendo that any power to confer an exclusive remedy to state court was sought.

Petitioner has misinterpreted the intent and factual situation involving **PARADISE** to maintain a basis for this courts review.

Further, **In RE EMERALD CITY RECORDS, INC. 9 B.R. 319 (Bk.N.D.Ga. 1981)** pre-dates the legislative changes of July 10, 1984 and the rights conferred to bankruptcy courts to conduct jury trials as indicated in **M^{c}CORMICK** and **ADAMS, BROWN & BATES, LTD.**

It is further noted that **EMERALD CITY** was based upon a formal request to the bankruptcy court for remand which was granted. In the present case, Petitioner did not request remand but rather waived its right and summarily proceeded to state court without first researching the current state

of federal law. Petitioners error at the bankruptcy court is the true reason relief is now sought before this Court.

Petitioners citation of **MID ATLANTIC NATIONAL BANK v. NEW JERSEY DEPT. of ENVIRONMENTAL PROTECTION 474 U.S. 494 (1986)** against seeks to boot strap the states interest in health and safety statutes and ordinances designed to protect the physical health of its citizens from civil wrongdoings. There is a clear distinction between health and safety versus civil claims. Respondent submits that appellants use of **MID ATLANTIC** is misplaced under the present facts and circumstances.

Respondent contends that the citation of **GUTHRIE, ACTION FOR MALICIOUS PROSECUTION BASED ON INVOLUNTARY BANKRUPTCY, INSOLVENCY OR RECEIVERSHIP PROCEEDING, 40 A.L.R. 3d 296 (1971)** is misplaced. First, Petitioner

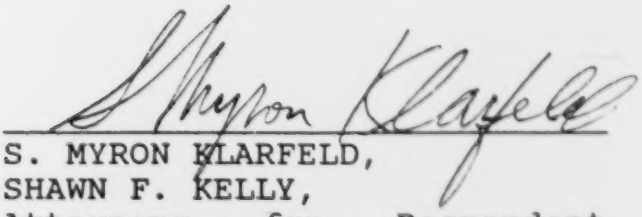
incorrectly cites the volume as being a 1986 edition. Secondly, Petitioner does not consider that the citation is out dated as since the 1971 publishing 11 U.S.C. § 303 was enacted and amended as of July 10, 1984 which grants remedies not otherwise available in 1971 when Mr. Guthrie published his article.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: February 9, 1990

Respectfully submitted,
KLARFELD & CAPPS

By: 

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 1660 Hotel Circle North, Suite 304, San Diego, California 92108; that on February 13, 1990, I served the within **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in said action or proceeding by depositing true copies thereof in a separate envelope for each addressee named hereafter, addressed to each addressee respectively as follows:

Clerk, U.S. Supreme Court 1 First Street, N.E. Washington, D.C. 20543	Original and 39 copies (via Federal Express)
Clerk, California Court of Appeal Fourth Appellate District 750 B Street, Suite 5000 San Diego, CA 92101	3 copies
Clerk of the San Diego Supervisor Court for the Honorable Jeffrey T. Miller 325 South Melrose Drive Vista, CA 92083	3 copies

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3003-3043 Fourth Avenue
San Diego, CA 92103

I then sealed the envelopes and placed them for mailing in accord with our business's practice on February 13, 1990.

I am readily familiar with our business's practice for collecting, processing and mailing correspondence and pleadings. Such correspondence and pleadings are deposited on the same day with the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 13, 1990.

Judith A. Atwood
JUDITH A. ATWOOD